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9 Board As Liquidating Agent For Western Corporate Federal Credit Union

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 NATIONAL CREDIT UNION
14 ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
15 WESTERN CORPORATE FEDERAL
CREDIT UNION,

16 Plaintiff,

17 v.

18 ROBERT A. SIRAVO, TODD M. LANE,
19 ROBERT J. BURRELL, THOMAS E.
SWEDBERG, TIMOTHY T. SIDLEY,
20 ROBERT H. HARVEY, JR., WILLIAM
CHENEY, GORDON DAMES, JAMES
21 P. JORDAN, TIMOTHY KRAMER,
ROBIN J. LENTZ, JOHN M. MERLO,
22 WARREN NAKAMURA, BRIAN
OSBERG, DAVID RHAMY and
23 SHARON UPDIKE,

24 Defendants.

Case No.: CV10-01597 GW (MANx)

**NOTICE OF MOTION AND
MOTION OF PLAINTIFF AND
COUNTERDEFENDANT
NATIONAL CREDIT UNION
ADMINISTRATION BOARD AS
LIQUIDATING AGENT FOR
WESTERN CORPORATE
FEDERAL CREDIT UNION TO
DISMISS AMENDED
COUNTERCLAIMS FOR: (1)
LACK OF SUBJECT MATTER
JURISDICTION; AND (2)
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF MAY BE
GRANTED [Fed. R. Civ. P. 12(b)(1)
and 12(b)(6)]**

Date: January 9, 2012
Time: 8:30 a.m.
Courtroom: 10

1 TO DEFENDANTS AND COUNTERCLAIMANTS, AND TO THEIR
2 ATTORNEYS OF RECORD HEREIN:

3 PLEASE TAKE NOTICE that on January 9, 2012, at 8:30 a.m., or as soon
4 thereafter as the matter may be heard before the Honorable George H. Wu, United
5 States District Judge, in Courtroom 10 of the United States Courthouse, 312 North
6 Spring Street, Los Angeles, California 90012, plaintiff and counterdefendant
7 National Credit Union Administration Board as Liquidating Agent for Western
8 Corporate Federal Credit Union (the "NCUA") will, and hereby does, move the
9 Court as follows with regard to (a) the Amended Answer and Counterclaims of
10 defendants and counterclaimants Robert A. Siravo and Thomas E. Swedberg filed
11 on October 31, 2011 [Docket 190], (b) the Second Amended Answer and Amended
12 Counterclaims of defendant and counterclaimant Timothy T. Sidley filed on October
13 31, 2011 [Docket 191], (c) the Amended Answer and Counterclaims of defendant
14 and counterclaimant Robert John Burrell filed on October 31, 2011 [Docket 192],
15 and (d) the Further Amended Answer and Counterclaims of defendant and
16 counterclaimant Todd M. Lane filed on October 31, 2011 [Docket 193]
17 (collectively, the "Counterclaims"):

18 (1) Pursuant to Fed. R. Civ. P. 12(b)(1), the NCUA will, and
19 hereby does, move to dismiss the Counterclaims to the extent that they
20 seek advancement or reimbursement of defense costs during the
21 pendency of this lawsuit or declaratory relief relating to any obligation
22 of the NCUA to provide advancement, reimbursement, or
23 indemnification on the ground that the Court lacks subject matter
24 jurisdiction over such claims under 12 U.S.C. § 1787(g), which
25 prevents courts from taking any action to "restrain or affect" the
26 NCUA's exercise of its statutory powers;

27 (2) pursuant to Fed. R. Civ. P. 12(b)(6), the NCUA will, and
28 hereby does, move to dismiss the Counterclaims to the extent that they

1 seek advancement or reimbursement of costs during the pendency of
2 this lawsuit or indemnification for failure to state a claim on which
3 relief may be granted, based upon each of the following reasons:

4 (a) defendants and counterclaimants Robert A.
5 Siravo, Thomas E. Swedberg, Timothy T. Sidley, Robert
6 J. Burrell, and Todd M. Lane (collectively, the “Officer
7 Defendants”) cannot state a claim against the NCUA for
8 advancement or reimbursement of costs during the
9 pendency of this lawsuit because 12 C.F.R. § 701.33(c)(6)
10 gives a credit union discretion whether to advance or
11 reimburse expenses during the pendency of a lawsuit;

12 (b) the Officer Defendants cannot state a claim
13 against the NCUA for advancement or reimbursement of
14 costs during the pendency of this lawsuit because neither
15 California law nor the Model Business Corporation Act
16 requires advances or reimbursements during the pendency
17 of a lawsuit, nor does the WesCorp policy (“Policy 21”)
18 relied upon by the Officer Defendants;

19 (c) the Officer Defendants cannot state a claim
20 against the NCUA for indemnification, advancement, or
21 reimbursement during the pendency of this lawsuit
22 because officers or directors of a failed financial
23 institution may not obtain indemnification for actions
24 brought against them by the institution’s receiver,
25 regardless of whether they might have had a right to
26 indemnification by the financial institution;

27 (d) the Officer Defendants cannot state a claim
28 against the NCUA for indemnification under Cal. Labor

Code § 2802 because (i) Section 2802 does not authorize an employee to obtain indemnification from an employer for expenses incurred by the employee in defending a lawsuit brought by the employer, and (ii) claims for indemnification by directors and officers of non-profit corporations are governed by the specific provisions of Cal. Corp. Code § 7237(d), not the more general provisions of Section 2802; and

(e) the Officer Defendants' claims for mandatory indemnification are not ripe because the Officer Defendants have not prevailed.

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities filed concurrently herewith, the NCUA's Second Amended Complaint, the Counterclaims, the [Proposed] Order lodged concurrently herewith, the records and files in this matter, and such further oral or written argument as may be considered by the Court.

This Motion is made following the conferences of counsel pursuant to Local Rule 7-3 that occurred on October 24, 2011 and November 3, 2011.

DATED: November 14, 2011 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
 Michael H. Bierman
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 Michael E. Pappas

By: /s/ Michael H. Bierman
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 National Credit Union Administration Board
 As Liquidating Agent For Western Corporate
 Federal Credit Union

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